of anything the disposal of which is rendered necessary by reason of its having been seized under section 110(1). The section then goes on to provide for the disposal of the two categories of things which may be seized under section 110(1). For the purpose of disposal these are to be treated alike, that is to say, forfeiture must be ordered if they are proved to the satisfaction of the Court to fall into either category. In order to achieve this effect, the draftsman has resorted to using the expression "goods" in the sense of the original definition in section 2, which is applicable, to, and embraces, both categories of things which may be seized.

We are therefore of the opinion that the learned President had no discretion to order the release of the motor car and that the appeal was properly allowed in accordance with the principle laid down by Wilson J. in *Ng Ham's*[1] case.

Order accordingly.

MOHAMED YUSOFF
v. PUBLIC PROSECUTOR

[Cr. R. J. (Buhagiar J.) April 11, 1956]

[K. L. — Criminal Revision No. 6 of 1956]

Penal Code s. 292 — Obscene pictures — Criminal Procedure Code (Cap. 6), s. 407(ii) — Order of forfeiture or destruction.

Section 407(ii) of the Criminal Procedure Code (Cap. 6) confers power on the Court to make an order not only for the forfeiture or confiscation but also for the destruction of property regarding which the offence is committed.

The proper order in connection with offences under s. 292 of the Penal Code should be one for destruction and not for confiscation and where such order is made the Magistrate should take such action as may be necessary to ensure that the order is carried out and satisfy himself that it has been carried out. It is also advisable for the Magistrate to certify on the relevant record that he is satisfied that the order has been carried out.

CRIMINAL REVISION.

Buhagiar J. : — My attention was drawn to Arrest Case No. 3085 of 1956 in the Magistrates' Court at Kuala Lumpur, in which the defendant was charged with being in possession of obscene pictures, an offence under section 292 of the Penal Code.

The defendant pleaded guilty and on such plea the learned Magistrate convicted the defendant and imposed a fine of $500 and in default two months' imprisonment. The learned Magistrate made an order that the pictures be confiscated. There is no question that this order is perfectly legal but in my view it is not the proper order to be made in cases of this nature. Section 407 (ii) of the Criminal Procedure Code confers power on the Court to make an order not only for the forfeiture or confiscation but also for the destruction of property regarding which the offence is committed. In the present case the proper order to be made is that for the destruction of the pictures.

In exercise, therefore, of the revisionary powers conferred on a Judge by Chapter XXXI of the Criminal Procedure Code I substitute an order for destruction for the order for confiscation, and direct the Registrar of the Supreme Court to ensure that this order is carried out.

I may also add that in cases where exhibits in connection with offences under section 292 of the Penal Code are produced, it is desirable that the Magistrate keep such exhibits under his personal control during the trial or take such steps as may be necessary to ensure that such exhibits do not come in the hands of any persons except in so far as it may be necessary for the proceedings and that where the order for the destruction is made the Magistrate take such action as may be necessary to ensure that the order is carried out and satisfy himself that it has been carried out. It is also advisable, in my view, for the Magistrate to certify on the relevant record that he is satisfied that the order has been carried out.

Order accordingly.

NG KIM PONG v. GOH CHING (f)

[C. A. (Mathew C.J., Whyatt C.J. (S) and Good J.) January 30, 1956]

[K. L. — F.M. Civil Appeal No. 54 of 1955]

Landlord and Tenant — Surrender of lease by operation of law.

In this case the plaintiff-respondent leased to the appellant for a period of four years a plot of land on which there was a cinema building. A memorandum of

lease was prepared but was never registered. The appellant ceased to operate the cinema business some time about March 1954. He abandoned the premises together with the seats, cinema screen, and other equipment necessary for the running of a cinema. Since March 1954 he had paid no rent. The appellant retained the keys of the premises but access to the premises was possible through an unlocked door. In his statement of claim the plaintiff-respondent pleaded an express surrender of the tenancy, but this was abandoned and the case was argued and decided on the basis (which was never pleaded) that there had been an implied surrender.

Held: (1) in order to constitute a surrender of the lease by operation of law, there must not only be a quitting of the premises by the tenant but also a taking of possession of the premises by the landlord; (2) in this case the plaintiff-respondent has failed to establish that a surrender by operation of law had occurred.

Cases referred to:—

(1) *Phene v. Popplewell* (1862), 12 C.B. (N.S.) 334.

(2) *Oastler v. Henderson* 2 Q.B.D. 575.

COURT OF APPEAL.

Dato Sir Roland Braddell for the appellant.

D. G. Rawson for the respondent.

Mathew C.J. (delivering the judgment of the Court): — There was only one point in this appeal; was there a surrender of the lease by operation of law?

The facts briefly were that the plaintiff-respondent leased to the appellant for a period of four years a plot of land on which there was a cinema building. A memorandum of lease was prepared but was never registered. Various negotiations for the sale of the cinema business to one Ong Whee Hock took place which are of no importance except that it appears that the appellant ceased to operate the cinema business some time about March 1954. He abandoned the premises together with the seats, cinema screen and other equipment necessary for the running of a cinema. Since March 1954 he has paid no rent to the respondent The appellant retained in his possession the keys of the premises, but this is of little importance as access to the premises was possible through an unlocked door.

In his statement of claim the plaintiff-respondent pleaded an express surrender of the tenancy, but this was abandoned and the case was argued and decided on the basis (which was never pleaded) that there had been an implied surrender.

In *Woodfall* on Landlord & Tenant, 24th edition, the following passage appears at page 900:—

"An agreement by landlord and tenant that the term shall be put an end to, acted upon by the tenant's quitting the premises, and the landlord by some unequivocal act taking possession, amounts to a surrender by operation of law."

This passage is supported in the case of *Phene v. Popplewell*[1] In this case the tenant left the key of the premises at the counting house of the landlord with the intention of relinquishing the tenancy. The landlord at first refused to accept it, but afterwards put up a board to let the premises, and from time to time used the key to show prospective tenants round the premises. He also painted out the tenant's name. It was held on these facts that there was sufficient evidence of a surrender by operation of law. In his judgment Erle C.J. says (at p. 339):—

"On the 12th of April (before the first quarter's rent became due), the key was left by the tenants at the counting-house of the landlord with the intention of relinquishing the tenancy; and it remained on the landlord's premises. It is true that the tenant's offer was not then accepted, but leaving the key with him was a continuing offer on the part of the tenants, and as soon as the landlord did an act which would have constituted him a trespasser if he had not exercised the option thus given to him, that afforded ground for the inference that he assented to the tenancy being put an end to. It was evidence to that effect. His taking the key and showing the premises with a view to letting them, knowing that the tenants were insolvent, and his putting up a board announcing that the premises were to be let, was also evidence of an election on his part to assent to the proposal of the tenants, and may be coupled with the subsequent painting out of the defendant's names and the taking actual possession after the 25th of October. Putting all these together, I can come to no other conclusion than that the landlord exercised his option to accept the surrender."

The point decided is clear: there must not only be a quitting of the premises by the tenant but also a taking of possession of the premises by the landlord, which shows that the landlord consented to the tenancy being put an end to.

This case was considered in *Oastler v. Henderson*[2], where it was held that:—

"There had been no possession of the house by plaintiffs so inconsistent with the continuance of defendant's term as to estop plaintiffs from alleging the continuance of it, so as to effect a surrender of the term by operation of law."

In our view, the plaintiff-respondent failed to establish by the evidence adduced that a surrender by operation of law had occurred, and we allowed the appeal with costs.

Appeal allowed.

Solicitors: *Braddell & Ramani; Shearn, Delamore & Co.*